TIMOTHY COURCHAINE
United States Attorney
District of Arizona
BROOKS CHUPP
Assistant United States Attorney
Arizona State Bar No. 040231
Two Renaissance Square
40 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-4449
Telephone: (602) 514-7500
Fax: (602) 514-7760
Email: brooks.chupp@usdoj.gov
Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Minh Khac Nguyen,

Petitioner,

v.

Fred Figueroa, *et al.*

Respondents.

Case No. 25-cv-3958-DJH (JFM)

SUR-REPLY TO PETITIONER'S MOTION FOR INJUNCTIVE RELIEF

I. INTRODUCTION

Respondents, by and through counsel, respond to the Court's Order dated November 3, 2025 (Doc. 11), and thus file this Sur-Reply to Petitioner's Reply in Support of his Motion for a Temporary Restraining Order and for a Preliminary Injunction (Doc. 10). In his Reply, Petitioner argues that Respondents have argued the wrong statute—Petitioner argues that the former 8 U.S.C. § 1431 grants him citizenship, not the former 8 U.S.C. § 1432, as Respondents briefed in their Response (Doc. 8).[1] The Court has ordered

[1] Petitioner did not respond to any points that Respondents made about Section 1432, so Petitioner has conceded that he does not qualify for derivative citizenship under Section 1432. "Generally, the failure to respond to an argument on its merits is grounds for deeming that argument abandoned or conceded . . . . This applies in failing in a reply brief to respond to an argument raised in a response brief." *Defries v. Union Pac. R.R. Co.*, 2025 WL 2193936, at *5 (D. Ore. July 31, 2025) (collecting cases).

Respondents to respond to Petitioner's Reply. Respondents argue two points below. First, Petitioner can only show that Section 1431 (and not Section 1432) applies to him if he can show that he was legally adopted, which he has not done. Second, this Court has no jurisdiction over Petitioner's habeas claim in this posture. For these reasons, the Court should deny the Petition.

II. THE HABEAS PETITION SHOULD BE DENIED

A. Petitioner may be removed because he is not a citizen.

Petitioner argues that Section 1431 granted him citizenship by operation of law when his sister became a naturalized American citizen. Petitioner claims that Section 1431 applies to him because, at the time of his birth, his sister was an alien and her husband was a United States citizen. *See* Doc. 10 at 8–11. However, the only way that Section 1431 can apply to Petitioner is if, at the time of his birth, he had one alien parent and one parent who was a United States citizen. Petitioner claims that his sister and her husband qualify, but they only qualify if they were, in fact, his parents by law. Petitioner has not shown that his sister and her husband were his legal parents, so this Court must deny the motion for injunctive relief.

In 1979, there were three statutes under which a minor child could be granted citizenship: 8 U.S.C. § 1431, which granted citizenship to certain children born to one citizen parent and one alien parent; 8 U.S.C. § 1432, which granted citizenship to certain children born to two alien parents; and 8 U.S.C. § 1433, which allowed any United States citizen to apply for citizenship on behalf of a minor child. Petitioner claims that he became a citizen by operation of Section 1431, which grants citizenship to "[a] child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States" upon the alien parent's naturalization if the child was an unmarried minor living in the United States as a lawful permanent resident at that time. 8 U.S.C. § 1431(a). Section 1431 also applies to "an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent, in the custody of his adoptive parents,

pursuant to a lawful admission for permanent residence." 8 U.S.C. § 1431(b). For purposes of adoption, a "child" is defined as "a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years . . . and the child is in the legal custody of the . . . adopting parent or parents at the time of such . . . adoption." 8 U.S.C. § 1101(c)(1) (1982).[2]

Petitioner has the same problem under Section 1431 as he had under Section 1432: he must prove that he was legally adopted by his sister and her husband "in the United States," and Petitioner has not done so. It is plain from the texts of both Section 1101(c)(1) and Section 1431 that *custody* and *adoption* are distinct concepts. Section 1101(c)(1) recognizes an adoption only if it "takes place before the child reaches the age of 16 years . . . *and* the child is in the legal custody of the adopting parent or parents at the time of such . . . adoption." 8 U.S.C. § 1101(c)(1) (emphasis added). Section 1431 likewise applies to "an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent, *in the custody of his adoptive parents*, pursuant to a lawful admission for permanent residence." 8 U.S.C. § 1431(b) (emphasis added). If all that was required for an adoption under these laws was physical custody, the emphasized portions of those statutes would be entirely superfluous. Rather, "[a] child is adopted . . . through an adoption," and "an adoption, as defined [in Section 1431] and commonly used, contemplates a formal judicial act." *Ojo v. Lynch*, 813 F.3d 533, 539–40 (4th Cir. 2016) (internal quotation marks omitted). Thus, Petitioner's claim cannot move forward unless he can show that he was legally adopted "in the United States," as Section 1101(c)(1) requires. Because Petitioner has not shown that he was legally adopted, let alone legally adopted "in the United States," his Section 1431 claim must be dismissed.

Petitioner's arguments to the contrary lack merit. Petitioner argues, with no citation to authority, that he must have been legally adopted in order to have gotten an immigrant visa before he left Vietnam. He asserts, without citation to authority, that he has lived as

[2] Section 1101(c)(1) also includes adopted children who are described in Section 1101(b)(1)(E)(ii) and (F)(ii), but these descriptions do not apply to Petitioner, for the same reasons described below.

the "legal son" of his sister and her husband since 1975, "which implies that any remaining formalities (if an IR-4 orphan visa was used requiring re-adoption in a U.S. court) would have been completed by the family shortly after arrival." Doc. 10 at 14–15. He finally asserts, without citation to authority, that the fact that he received an entry visa "gives rise to a presumption of the adoption's validity." Petitioner has provided no evidence whatsoever to support any of these assertions. When an alien claims citizenship, they bear the burden to prove their eligibility, and any doubts are "resolved in favor of the United States and against the claimant." *Alocozy v. United States Immigr. and Customs Servs.*, 704 F.3d 795, 799 (9th Cir. 2012) (quoting *Berenyi v. Dist. Dir.*, 385 U.S. 630, 636–37 (1967)). At best, Petitioner's circumstantial evidence leaves room for doubt, and those doubts must be resolved against him.

B. This Court has no jurisdiction to grant the Petition.

In their Response, Respondents argued that this Court has no jurisdiction to hear Petitioner's claim because it constitutes a direct attack on a final order of removal, and the only way to attack a final order of removal is by filing a petition for direct review in the appropriate circuit court of appeals. Petitioner's reply provide no legal basis for this Court to find that it has jurisdiction.

The "sole and exclusive means" of judicial review of a final order of removal is a petition for review in a federal court of appeals. 8 U.S.C. § 1252(a)(5). Similarly, "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions" may only occur via a petition for review. 8 U.S.C. § 1252(b)(9); *see also Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012). Whether a claim constitutes a challenge to an order of removal turns "on the substance of the relief that a plaintiff is seeking," and a claim is a prohibited challenge to an order of removal when it "challenges the procedure and substance of an agency determination that is inextricably linked to the order of removal." *Martinez*, 704 F.3d at 622–23 (quoting *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d. Cir. 2011) and *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1082–83 (9th Cir. 2010)) (internal quotation marks

omitted). This prohibition applies to a habeas petition where the petitioner claims to be a naturalized American citizen. *See Iasu v. Smith*, 511 F.3d 881 (9th Cir. 2007).

Congress clearly and obviously stripped federal district courts of any jurisdiction to review or attack final orders of removal issued by immigration courts:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review[3] of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under Section 2241 of Title 28, or any other habeas corpus provision . . . or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9).

Federal courts of appeal, including the Ninth Circuit, have called Section 1252's various parts a "zipper clause" that bars habeas claims in almost all circumstances. *See Iasu*, 511 F.3d at 887 ("Congress' clear intent [was] to have all challenges to removal orders heard in a single forum (the courts of appeals)[.]") (quoting *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005)) (alterations in original); *see also Kapoor v. DeMarco*, 132 F.4th 595, 608 (2d Cir. 2025) ("Section 1252(a)(5) already precludes habeas review of nearly all challenges to final orders of removal."); *Aguilar v. United States Immigr. and Customs. Enforcement*, 510 F.3d 1, 9 (1st Cir. 2007) ("[Section 1252] was designed to consolidate and channel review of *all* legal and factual questions that arise from the removal of an alien into the administrative process, with judicial review of those decisions vested exclusively in the courts of appeals.") (emphasis in original). In other words, district courts have essentially no jurisdiction whatsoever over challenges to final orders of removal.

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[3] "[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review" of a final order of removal. 8 U.S.C. § 1252(a)(5).

The substance of Petitioner's claim is undoubtedly a challenge to his final order of removal. A habeas petition is a direct challenge to a removal order—and hence barred under Section 1252(a)(5)—when "the order of removal entered by the IJ and affirmed by the BIA . . . would necessarily be flawed" if the petitioner were to "obtain[] the relief he seeks." *Estrada v. Holder*, 604 F.3d 402, 408 (9th Cir. 2010). And it is clear that if this Court were to grant Petitioner his requested relief—here, release from custody and an injunction against removal based on the determination that he is a citizen—the order of removal "would necessarily be flawed." Petitioner argues otherwise, but his argument is self-defeating. He argues that his claim "does not attack the removal order itself; it asserts that he is not subject to removal at all[.]" Doc. 10 at 20. But, as *Estrada* makes plain, this is a distinction without a difference. If Petitioner is right, as he claims, that he cannot be removed, then the final order of removal was inherently flawed. Petitioner's argument that his claim is not an attack on the final order of removal because the immigration court may not have considered the question likewise does not help him. First, removal proceedings may only be brought against an alien, *see, e.g.*, 8 U.S.C. § 1229(a)(1), so the immigration court's decision to exercise jurisdiction over Petitioner entailed a determination that he was an alien by necessity. Second, citizenship may be raised as a defense to removal in removal proceedings, *see Rios-Valenzuela v. Dep't of Homeland Sec.*, 506 F.3d 396–97 (5th Cir. 2007), which makes it a "question of law [or] fact . . . arising from any action taken or proceeding brought to remove an alien from the United States" of the sort that cannot ground a habeas challenge, as the Ninth Circuit found in *Iasu*. *See Iasu*, 511 F.3d 887–88; 8 U.S.C. § 1252(b)(9).

Petitioner's attempt to distinguish *Iasu* fails. Petitioner argues that he "does not claim citizenship by naturalization, but by operation of law as a minor under [the former 8 U.S.C. § 1431]." Doc. 10 at 19. But this argument ignores the fact that what Section 1431 grants is naturalization, because it necessarily grants citizenship after the birth of a child. *See* 8 U.S.C. § 1101(a)(23) (1982) ("The term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever."). Thus, this is a

distinction without a difference. Petitioner's case citations likewise fail because both came to the court of appeals on a petition for review of a final removal order. *See Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005); *Joseph v. Att'y Gen.*, 421 F.3d 224 (3d Cir. 2005).[4] As discussed above, the only court with jurisdiction to review Petitioner's final order of removal and his claim of citizenship is the Ninth Circuit Court of Appeals on a petition for review. This Court is wholly without jurisdiction to hear Petitioner's challenge to his removal order.

Petitioner also claims that this Court has jurisdiction under 8 U.S.C. § 1252(b)(5). Doc. 10 at 16–17. However, that section allows this Court to decide nationality claims only on transfer from the Ninth Circuit from a petition for review, *see* 8 U.S.C. § 1252(b)(5)(B) ("If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court . . . ."); 8 U.S.C. § 1252(b)(5)(C) ("The petitioner may have such nationality claim decided only as provided in this paragraph.").[5] This proceeding has not come to this Court from the Ninth Circuit, but rather is before the Court as an original habeas proceeding, which means it is not within this Court's

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[4] Petitioner cites *Hughes v. Ashcroft*, 255 F.3d 752, 755–57 (9th Cir. 2001) for the proposition that citizenship claims may be reviewed even when the removal order may not be. Doc. 10 at 20. In *Hughes*, the Ninth Circuit determined that it retained jurisdiction in criminal alien removal cases to determine whether the petitioner is, in fact, an alien. Importantly, however, as with the other cases Petitioner cites, *Hughes* properly came before the Ninth Circuit on a petition for review of the BIA's final order of removal, and nothing in the decision suggests that a district court has jurisdiction to consider an alien's claim to citizenship in a habeas action.

[5] There is one additional instance in which a district court may exercise habeas jurisdiction over nationality claims: when a petitioner claims to be a citizen after expedited removal proceedings under 8 U.S.C. § 1225(b)(1). *See* 8 U.S.C. § 1252(e)(2) ("Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of – whether the petitioner is an alien."). Petitioner was not ordered removed in expedited removal proceedings; he received full removal proceedings under 8 U.S.C. § 1229. Petitioner does not claim that this Court has jurisdiction under Section 1252(e)(2), but for the sake of completeness, Respondents wish to reassure this Court that jurisdiction may not be found here either.

jurisdiction to decide. *See Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (holding that district court correctly dismissed petitioner's citizenship claim brought in habeas for lack of jurisdiction since as such claims "must be brought in the court of appeals.").

Petitioner also argues that this Court has jurisdiction because immigration courts and the Board of Immigration Appeals cannot conclusively determine claims to citizenship. Doc. 10 at 18–19. This assertion is patently untrue, and neither of the cases that Petitioner cites has anything at all to do with whether the immigration court or the BIA has authority to determine a claim to U.S. citizenship. Petitioner cites *Matter of H-G-G-*, 27 I. & N. Dec. 617, 632 (BIA 2019) and *In re Rodriguez-Tejedor*, 23 I. & N. Dec. 153, 164 (BIA 2001) for the proposition that if the alien raises a "non-frivolous claim to U.S. citizenship, the burden is on the government to establish alienage by clear and convincing evidence. If the claim cannot be resolved on the record or presents a genuine factual dispute, it must be adjudicated de novo in federal district court pursuant to 8 U.S.C. § 1252(b)(5)." Doc. 10 at 18–19. *Matter of H-G-G-* involved whether a recipient of Temporary Protected Status was considered to have maintained lawful status for purposes of adjustment of status. The applicant in that case was admittedly a citizen of El Salvador, never claimed U.S. citizenship, and the only mention of "burden" is in the background section of the decision wherein the BIA recounts that "[i]t is the [a]pplicant's burden to establish his eligibility for adjustment of status as a derivative of his wife's family-based third preference visa classification." 27 I. & N. Dec. at 618. Similarly, although *In re Rodriguez-Tejedor* addresses a claim of derivative citizenship, it does not stand for the proposition for which Petitioner cites it. Rather, in that case, the BIA held that "[i]n deportation proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, and the burden shifts to the respondent [i.e., the alien in removal proceedings] to prove citizenship. *Matter of Leyva*, 16 I. & N. Dec. 118, 119 (BIA 1977)." 23 I. & N. Dec. at 164. It went on to find that "the respondent's claim of derivative citizenship [was] not supported by a preponderance of credible evidence," and thus dismissed the appeal. *Id.* Petitioner's reliance on *Matter of H-G-G-* and *In re Rodriguez-Tejedor* is both misplaced and neither

case supports the Petitioner's argument that citizenship cannot be determined by the immigration court or the BIA.

Moreover, even if Petitioner's argument were an accurate description of an immigration court's authority—and it is not—Petitioner has pointed to no source of law authorizing this Court to declare him a citizen. Indeed, 8 U.S.C. § 1503, the statute which grants authority to district courts to issue declaratory judgments on citizenship, expressly forbids district courts to issue such judgments "if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding," which is clearly the case here. 8 U.S.C. § 1503(a); *see also Viloria v. Lynch*, 808 F.3d 764, 768 (9th Cir. 2015). Further, Petitioner's claim that jurisdiction exists under the Declaratory Judgment Act fails because "[t]he Declaratory Judgment Act . . . is a procedural device only; it does not confer an independent basis of jurisdiction on the federal court." *Alton Bd. Box. Co. v. Espirit de Corp.*, 682 F.2d 1267, 1274 (9th Cir. 1982).

Congress clearly and unequivocally stripped the district courts of jurisdiction over challenges to final orders of removal. No matter what semantic arguments Petitioner may make, this is plainly a challenge to his final order of removal. Thus, if Petitioner wants to press his claim of citizenship, he must file a motion to reopen his removal proceedings in the immigration court, appeal any adverse decision to the BIA, and then seek review from the Ninth Circuit. In no event does this Court have jurisdiction to decide Petitioner's claim to citizenship and his challenge to his order of removal in this habeas proceeding. This Court should dismiss the Petition and deny the motion for injunctive relief due to lack of jurisdiction.

RESPECTFULLY SUBMITTED November 4, 2025.

TIMOTHY COURCHAINE
United States Attorney
District of Arizona

s/Brooks Chupp
BROOKS CHUPP
Assistant United States Attorney
Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2025, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing.

s/Mary Finlon
United States Attorney's Office